Supreme Court, U. S.
FILED
FEB 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1032

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Petitioner, Scott Hudgens, an individual (herein "Hudgens"), respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia entered in this case on October 7, 1974. This decision became final for the purpose of review by this Court on January 22, 1975 when the Supreme Court of Georgia denied petitioner's writ of certiorari.

OPINIONS BELOW

The opinion of the Georgia Superior Court is not and will not be reported; it is reprinted as Appendix A hereto. The initial decision of the Georgia Supreme Court, holding that it lacked jurisdiction to hear an appeal directly from the Superior Court, is reported at 231 Ga. 669, 203 S.E. 2d 478 (1974), and is

reprinted at Appendix B. The subsequent opinion of the Georgia Court of Appeals and order denying rehearing are not as yet reported and are attached as Appendix C and D. The Georgia Supreme Court's denial of petitioner's writ of certiorari is not reported and is reprinted as Appendix E hereto.

JURISDICTION

The opinion of the Court of Appeals of Georgia (App. C, p. A4) issued on October 7, 1974 and became final, for purposes of review by this Court, when the Supreme Court of Georgia denied petitioner's writ of certiorari on January 22, 1975. (App. E, p. A12.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether state courts are preempted by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, from determining whether the unauthorized entry of union pickets on private property constitutes a trespass within the meaning of state criminal trespass statutes.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* (herein "the Labor Act"); the Georgia Criminal Trespass Law, Title 26, Ga. Code Ann. § 1503 (herein "the Criminal Trespass Statute"); and the Georgia Declaratory Judgment Act, Title 110, Ga. Code Ann. § 1101, are set forth in the Appendix. (App. F, p. A13-15.)

STATEMENT OF THE CASE

Scott Hudgens, an individual employer with principal offices in Atlanta, Georgia, owns the North DeKalb Shopping Center located in a partially residential, partially small business area of unincorporated DeKalb County, Georgia. The Center is private property.

Local 315, Retail, Wholesale Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act. The Union represents, *inter alia*, employees of the Butler Shoe Company, an employer who maintains a retail store in the Center.

As a result of a dispute between the Union and Butler over the terms of a new collective bargaining agreement, on January 22, 1971, various members of the Union, acting under its authority, appeared on the interior mall property of the Center in order to picket the Butler store. As soon as the pickets were observed by an agent of Hudgens, they were asked to cease their activities and leave the mall area pursuant to Hudgens' well-established, non-discriminatory policy of forbidding all non-commercial activities on Center premises.[1] The pickets left but returned and resumed picketing which ceased only after they were threatened with arrest under the Georgia Criminal Trespass Statute if they failed to depart. The Union, however, thereafter filed unfair labor practice charges with the National Labor Relations Board, alleging that Hudgens improperly excluded the pickets, and has continued to press those charges.[2]

1. See *Steffel* v. *Thompson*, ... U.S. ....., 39 L. Ed. 2d 505, 512 (1974), which involved Hudgens' exclusion, pursuant to the Criminal Trespass Statute, of Viet Nam war protestors from the North DeKalb Shopping Center. The pendency of the instant action is referred to an n. 22 (..... U.S. ..... at ....., 39 L. Ed. 2d at 524) of that opinion.

2. The Board originally determined that Hudgens had committed an unfair labor practice by excluding the Union pickets (192 NLRB 671). Subsequently, after Hudgens had sought review of this decision, this Court decided *Lloyd Corp.* v. *Tanner*,

For example, as late as October 30, 1974, the Union intervened in proceedings involving those charges then pending before the United States Court of Appeals for the Fifth Circuit.[3] Accordingly, since the Union continues to contend that it has a right to picket upon Hudgens' private property, there is a substantial likelihood that picketing on Center property will occur whenever the Union has a dispute with either Butler or any other Center tenant. Such picketing, Hudgens believes, would constitute a violation of the Criminal Trespass Statute.

As a result of this continuing dispute with the Union, and the likelihood of a resumption of its disputed activities, Hudgens filed the present action under the Georgia Declaratory Judgment Act seeking a declaration that the Union would be in violation of the Criminal Trespass Statute if it engaged in unauthorized entry upon Hudgens' private property. The Union replied by filing a motion to dismiss and a plea to jurisdiction which argued that the dispute was wholly within the jurisdiction of the National Labor Relations Board (App. A, p. A1).

A hearing, not on the merits of the case, but on the motion to dismiss and the plea to jurisdiction, was held on June 26, 1973 in the Superior Court of Fulton County. That Court ruled that jurisdiction of the dispute lay solely with the Labor Board and that the complaint failed to present "a claim cognizable in equity" (App. A, p. A2). The Court of Appeals,[4] addressing

407 U.S. 551 (1973), and *Central Hardware* v. *N.L.R.B.*, 407 U.S. 539 (1973). In light of those cases, the Board obtained a remand from the Fifth Circuit Court of Appeals to reconsider its earlier decision. On remand, the Board (205 NLRB No. 104) proceeded to affirm its previous decision and that decision was, in turn, affirmed by the Court of Appeals, 501 F.2d 161.

3. Hudgens has filed a petition for writ of certiorari in this Court (No. 74-773) from the decision of the Fifth Circuit which is presently pending. On February 11, 1975, Hudgens filed a motion to defer consideration of that Petition until the instant petition was filed.

4. Hudgens had sought direct review by the Georgia Supreme Court since its action arguably raised equitable questions involving the constitutionality of a state statute. The Georgia Supreme Court, however, concluded that it was without jurisdiction (App. B, p. A3) and transferred the appeal to the Court of Appeals.

only the jurisdictional issue, affirmed (App. C, p. A11) and denied petitioner's motion for rehearing (App. D, p. A12). Hudgens' subsequent Court application for certiorari was denied by the Georgia Supreme Court without opinion (App. D, p. A12).

REASONS FOR GRANTING THE WRIT

A. This Case Presents a Significant Question of Federal Law Which Has Not Been, But Should Be, Decided by This Court

This Court should grant review in order to resolve a substantial, recurrent question not heretofore decided by this Court, *viz.*, whether, under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), state courts retain jurisdiction to declare a trespass by union pickets on private property to be violative of state law.

This Court previously recognized the importance of this issue in *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), and *Taggart* v. *Weinacker's*, 397 U.S. 223 (1970). In both cases, certiorari was granted as to the very same question as that presented here. In *Logan Valley*, however, the Court did not reach this question (391 U.S. at 309, n.1; see also the dissenting opinion of Mr. Justice Harlan, 391 U.S. at 333) and the issue was similarly left undecided in *Taggart* when the writ of certiorari there was dismissed as improvidently granted. 397 U.S. at 226. The Chief Justice, in a concurring opinion in *Taggart*, did note that, in his opinion, contrary to the decision of the Georgia courts in this case:

> "[A]ny contention that the States are preempted is without merit. . . . Nothing in [*Garmon*] . . . would warrant this Court to declare state-law trespass remedies to be ineffective and thus to remit a person to his own self-help resources if he desires redress for illegal trespassory picketing. . . . A holding that Congress preempted this entire area is as inappropriate here as it was in *Linn* [v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966)],

and for precisely the same reasons. Cf. *International Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. at 201, 25 L. Ed. 2d at 223 (White J., concurring)."

397 U.S. at 227-29. Mr. Justice Harlan's separate memorandum in *Taggart* disagreed with the Chief Justice's opinion, as well as the view of Mr. Justice White (joined by The Chief Justice and Mr. Justice Stewart) in *Ariadne*, for essentially the same reasons as those relied on by the court below. 397 U.S. at 229-231.

The instant case presents this Court with an appropriate vehicle to resolve this undecided question. If, on the other hand, the decision below is allowed to stand, there will be a number of undesirable results: (1) the present uncertainty and conflict as to whether the States have jurisdiction in the instant circumstances to enforce their trespass laws will continue with the consequence that the rights of unions and employers will vary from forum to forum; (2) States, such as Georgia, which have concluded that their jurisdiction is preempted, will be unable to protect a "deeply rooted" state interest which is of only "peripheral concern" to the Labor Act—the protection of private property rights from trespass (*Taggart*, 397 U.S. at 227-229 (Burger, C. J., concurring)); and (3) property owners will have to rely solely on self-help to protect their property from trespass, with a consequent threat to domestic peace.

B. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the States

One of the reasons this Court granted certiorari in *Linn* was to resolve a similar preemption conflict *i.e.*, the extent to which the labor act preempted state libel action jurisdiction, because "[t]he question . . . has been a recurring one in both state and federal tribunals." 383 U.S. at 57. (footnote omitted) The question presented in this case is of the same magnitude. The extent to which the Labor Act supercedes the jurisdiction of state courts to protect their constituents' private property from trespass has been a recurrent question whose resolution has varied from state to state.

Contrary to the decision below, the courts of many states have asserted jurisdiction, notwithstanding *Garmon*, to decide whether union pickets have trespassed private property in violation of state law. See, *e.g.*, *People* v. *Goduto*, 21 Ill. 2d 605, 174 N.E. 2d 385, *cert den.*, 368 U.S. 927 (1961), where the Illinois Supreme Court enjoined picketing on a private parking lot;[5] *Marriott Corp.* v. *Rosado*, 70 Misc. 2d 423, 333 N.Y.S. 2d 114 (1972), *aff'd*, 353 N.Y.S. 2d 924 (App. Div. 1974), where union picketing at various terminal buildings at Kennedy and LaGuardia Airports was enjoined; *Jack Loeks Enterprises* v. *Local 291*, 87 LRRM 3105 (No. 74 16697 CZ (Mich. Cir. Ct., Kent County, November 15, 1974), where a preliminary injunction was issued to restrain union picketing on the "parking lot, sidewalk, theatre building, or other associated areas" of a shopping center tenant; *Moreland Corp.* v. *Retail Store Employees Union*, 16 Wisc. 2d 499, 114 N.W. 2d 876 (1962) where the Wisconsin Supreme Court upheld an injunction prohibiting union members from picketing on the private property of a shopping center; and *Hood* v. *Stafford*, 213 Tenn. 684, 378 S.W. 2d 766 (1964), where the Tennessee Supreme Court concluded that it had jurisdiction to enforce against a union picket a state statute which proscribed entering a business or standing outside it for the purpose of enticing anyone therefrom. Other state courts, however, like the Georgia courts in the present case, have reached an opposite result and considered their jurisdiction preempted under *Garmon*.[6] Review by this Court is warranted

5. The Court held that the "State's interest in preserving domestic peace" and "the company's right to protect its property interests" justified an assertion of jurisdiction; it reasoned that "[t]he basic purpose of the statute is the prevention of violence or threats of violence . . .;" that had the State not intervened the employer would have had to forcefully remove the pickets; and that had the employer used force, "the threat of violence . . . [would have been] imminent." 174 N.E. 2d at 388. Thus, the Court rested its holding on a state court's traditional jurisdiction to enjoin violent conduct even where that conduct is also an unfair labor practice under the Labor Act. See, e.g., *United Auto Workers* v. *W.E.R.B.*, 351 U.S. 266 (1956).

6. See, e.g., *Freeman* v. *Retail Clerks Union Local No. 1207*, 58 Wash. 2d 426, 363 P. 2d 803 (1961), where the Supreme Court

therefore, to resolve a question of federal preemption which has divided state courts and resulted in a concommitant dislocation of national labor policy.

C. The Court Below Has Misconstrued the Decisions of This Court

The court below misconstrued *Garmon*. That case expressly recognized that where—as in the case of trespass—the activity involved is "a merely peripheral concern of the Labor Management Relations Act" or ". . . where the regulated conduct touches interests . . . deeply rooted in local feeling or responsibility" (*Garmon*, 395 U.S. at 243, 244), state jurisdiction is not preempted. The picketing here is encompassed by these principles.

First, unauthorized picketing on private property does not fall within either the proscription or protection of the Labor Act. As the Chief Justice observed in his concurrent opinion in *Taggart:* "Congress . . . has provided no remedy to an employer within the National Labor Relations Act to prevent an illegal trespass on his premises." 397 U.S. at 227.[7] This un-

of Washington held that, since an action for trespass by a shopping center owner against a labor union was an "arguable subject" of the Labor Act, the Court did not have subject matter jurisdiction; *United Maintenance Co.* v. *Steelworkers*, 86 L.R.R.M. 2364 (No. 13405, West Va. Ct. App., April 9, 1974), where the Court held that it lacked jurisdiction to enjoin a trespass; and *Hennepin Broadcasting Associates* v. *AFTRA*, 84 LRRM 2218 (No. 696356 Minn. Dist. Ct., 4th Dist., Aug. 7, 1973), where the Court denied a motion for a temporary order restraining union picketing on or near a radio station's premises on the ground that its jurisdiction was preempted.

7. See also *e.g.*, *Organizing And The Law, A Handbook for Union Organizers* (1967), by Stephen I. Schlossberg, General Counsel, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), at p. 40:

> "If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, he does so *without the protection of the Labor Act.* The employer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from his property. *There is, however, no section of the Taft-Hartley Act available to the employer in this situation.*" (emphasis added.)

availability of a Board remedy "vitiates the ordinary arguments for preemption." *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. at 64; see also Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1363 (1972); and Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassing Union Activity*, 83 Harv. L. Rev. 552, 558, 567 (1970). Of course, as in this case, a union may claim that an employer, by invoking self-help or a state trespass law, has violated the Labor Act. The applicability of the state trespass law, however, will be merely incidental, if not irrelevant, to the resolution of that claim. See the petition in No. 74-773, and the underlying decisions therein cited at note 2, *supra*. The necessity of providing a state remedy here, in the absence of providing a federal remedy, is surely as compelling as the converse situation dealt with by this Court in *Steffel*.

Second, trespass is surely a matter which is deeply rooted in local concern. To again quote the Chief Justice in *Taggart:* "The protection of private property . . . through trespass laws is historically a concern of state law." 397 U.S. at 227. There is, after all, an "overriding state interest . . . involved in the maintenance of domestic peace" (*Plumbers Union* v. *Borden*, 373 U.S. 690, 693 (1963)), and the basic purpose of trespass statutes, such as the Criminal Trespass Statute, is "the prevention of violence or threats of violence" *People* v. *Goduto*, 174 N.E. 2d at 387.

The Georgia courts thus have concurrent power, alongside the National Labor Relations Board, to entertain actions involving unauthorized union entry on private property. This is not an unusual situation in labor law; the States and the Labor

Board also have concurrent authority in cases involving libel (*Linn* v. *United Plant Guard Workers Local 114, supra*); breach of a union's duty of fair representation (*Vaca* v. *Sipes*, 386 U.S. 171 (1967)); and picketing where there has been violence or threats of violence (*United Auto Workers* v. *W.E.R.B.*, 351 U.S. 266 (1956)). There may be, in addition, other instances where the Labor Board will defer to state courts for their construction of relevant state law.[8] All of these cases involved an area of traditional state concern which has been regulated by a state law of general application. Trespass is another important state interest, which is similarly regulated by a law of general application. Contrary to the decision below, *Garmon*, it is submitted, did not preclude the States from uniform enforcement of its trespass laws.

8. See, *e.g.*, *Stein Printing*, 204 NLRB No. 2, where the Board, in determining whether an employer had violated Section 8(a)(2) of the Labor Act, utilized a Georgia court's (*Stein Printing Co.* v. *A.T.U., Local No. 48*, Nos. B-66437 and B-67125; 83 LRRM 3029 (1973) construction of its Right-to-Work Law, 54 Ga. Code Ann. § 904) A utilization of the Criminal Trespass Law, as is interpreted by the Georgia courts in this case, would have been similarly desirable in the Hudgens' companion Board case (No. 74-773). Indeed, a decision in the instant case might have presented "substantial and immediate possibility of obviating [the Union's] federal claim by a decision on state law grounds." *Steffel*, 39 L. Ed. 2d at 524, n. 22. A finding, for example, that Hudgen's had no basis for invoking the Criminal Trespass Law against the Union, while not dispositive of the Board case, would, in effect, have negated Hudgen's principal defense in that matter.

CONCLUSION

For all the foregoing reasons, Scott Hudgens respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendices

APPENDIX A

IN THE SUPERIOR COURT
For The County of Fulton
State of Georgia

SCOTT HUDGENS, *Plaintiff*,
vs.
LOCAL 315, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO, a Labor Organization, et al., *Defendant*.

Civil Action
File No. B-81424

ORDER

The above captioned matter came on before this Court for hearing on two motions by Defendant, Local 315; the two motions being a Plea to Jurisdiction and a Motion to Dismiss. After hearing, the Court reserved a ruling in order to afford counsel the opportunity to submit supplemental briefs and further citations of authority.

The Court has received said supplemental briefs, together with citations of authority, and has reviewed the argument advanced in the briefs, all citations of authority and has considered the argument of counsel at the hearing and, after giving due consideration to each of these factors, enters the following order.

The National Labor Relations Board, and not this Court, is the proper forum for this action and is vested with jurisdiction to administer the law in such cases, therefore the Defendant's Plea to the Jurisdiction is hereby sustained.

Consistently with the above ruling, the Defendant's Motion to dismiss is hereby sustained and the complaint is also ordered dismissed since the petition fails to present a claim cognizable in equity.

IT IS SO ORDERED.

This 26th day of July, 1973.

APPENDIX B

IN THE SUPREME COURT OF GEORGIA

28377. *Hudgens* v. *Local 315, Retail, Wholesale and Department Store Union, AFL-CIO, et al.*

GUNTER, *Justice*. Appellant, Scott Hudgens, has come to the Supreme Court of Georgia seeking review of two adverse judgments in the trial court which dismissed his complaint as to two defendants.

The complaint as originally filed sought a declaratory judgment and injunctive relief against the defendants. However, after the complaint was filed the appellant voluntarily eliminated the injunctive feature from the case. See page 15 of the record and page 23 of the transcript.

The enumeration of errors filed in this Court is as follows:

> "The Supreme Court has jurisdiction of this appeal as an action drawing into question the constitutionality of a statute of the State of Georgia, the Criminal Trespass Law, and since the Court below treated the action as equitable in nature . . . jurisdiction is, therefore, vested in this Court pursuant to Article VI, Section 2, Paragraph 4 of the Constitution of Georgia of 1945."

Having examined the pleadings, the motions, and the argument of counsel before the trial court, we do not find that the constitutionality of Georgia's Criminal Trespass Law (Code § 26-1503) has been drawn into question in this case. This case is simply a delaratory judgment action with no injunctive relief being sought and no constitutional question within the Georgia Supreme Court's appellate jurisdiction being raised. Therefore, jurisdiction of this appeal is in the Court of Appeals of Georgia. The case is accordingly transferred to that court.

It is so ordered. All the Justices concur.

APPENDIX C

49328. *Hudgens* v. *Local 315 Retail & c. Union and Steffel*

CLARK, *Judge*.

Scott Hudgens, owner of a large shopping center, sought a declaratory judgment and injunctive relief in the Fulton County Superior Court. There were three defendants: (1) a local labor union of the Retail, Wholesale, and Department Store Union, AFL-CIO, (2) an unincorporated association engaged in propagandizing against our nation's participation in the Southeast Asia conflict under the name of "The Atlanta Mobilization Committee," and (3) Richard Guy Steffel individually and as a member of that committee. As it was acknowledged in trial court (T. 54) that the AMC was no longer in existence and therefore to be dismissed from this suit, we deal only with the other two defendants. We find their factual and legal positions to be totally disparate. Accordingly we must consider their cases independently of each other. Additionally, it should be noted that plaintiff's voluntary elmination of his equity injunction prayers in the trial tribunal and the absence of any constitutional question resulted in this appeal being transferred to us by the Supreme Court. *Hudgens* v. *Local No. 315 & c. et al.*, 232 Ga. [*sic*] (..... S. E. 2d .....).

The crux of the complaint as stated in its "Introductory Statement" is as follows:

> "Scott Hudgens seeks to have this Court declare that the Georgia Criminal Trespass Law, Title 26, Ga. Code Ann. § 26-1503, . . . may be enforced against the defendants and others similarly situated, and that the defendants be enjoined, pursuant to that law, from trespassing on the private shopping center premises of Scott Hudgens."

As to Steffel

In October 1970, two years before plaintiff landowner filed the instant suit, Steffel and others had sought to distribute handbills in the public areas of plaintiff's shopping center protesting the war in Viet Nam. On the first occasion they complied with the direction from the shopping center's representative to cease and leave. They re-appeared two days later and were again asked to depart from the premises. At least one participant refused to desist and remained on the premises. She was arrested by the DeKalb County police and charged with violation of the Georgia Criminal Trespass statute. Our record does not disclose disposition of these arrest charges but footnote 3 of the U. S. Supreme Court decision of *Steffel* v. *Thompson*, 415 U. S. ....., 39 L. E. 2d 505, 94 S. Ct. 1209, states "that the trial of petitioner's companion, Sandra Lee Becker, has been stayed pending decision of this case."

Steffel complied with the request to leave but thereafter filed a complaint in the United States District Court under the Civil Rights Act wherein he sought a Federal Declaratory Judgment that the Georgia Criminal Trespassing statute was being applied in violation of petitioner's First and Fourteenth Amendment rights. After dismissal of his action in the trial court (*Becker* v. *Thompson*, 334 F. Supp. 1386 (N. D. Ga. 1971)) and affirmance in the Circuit Court of Appeals (*Becker* v. *Thompson*, 459 F. 2d 919 (5th Cir. 1972)) certiorari was granted by the United States Supreme Court. There, in *Steffel* v. *Thompson, supra*, a unanimous court reversed and remanded for the District Court to determine if the controversy still continued in view of the reduction of the nation's involvement in Viet Nam.

The trial record in our appeal to which we are normally limited in considering any case (*Maloy* v. *Dixon*, 127 Ga. App. 151 (1) (193 S. E. 2d 19)) contains nothing as to this Federal litigation. Nevertheless, we recognize all U. S. Supreme

Court decisions and must additionally make reference thereto because Steffel has filed a dismissal motion in our court. He has moved to dismiss the appeal as to him on the basis that it "has been mooted by intervening changes in the fact situation which have eliminated the adversity between the parties." In doing so, Steffel has also provided us with a copy of his letter to the Hon. Albert J. Henderson, Jr. of the U. S. District Court. Therein he quotes the U. S. Supreme Court's suggestion from page 7 of the slip opinion:

> "Since we cannot ignore the recent developments reducing the Nation's involvement in that part of the world, it will be for the District Court on remand to determine if subsequent events have so altered petitioner's desire to engage in handbilling at the shopping center that it can no longer be said that this case presents 'a substantial controversy, between parties having adverse legal interests, sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' "

In his motion in our court to dismiss for mootness he reiterates that he will not return to the shopping center for any handbilling or similar activities.

Appellant argues Steffel's dismissal motion should be denied because of the possibility of a repetition and "the parties should be entitled to know their respective rights when such a confrontation occurs again." The controlling precedents require us to enter a dismissal as to Steffel. "The Georgia Declaratory Judgments Act makes no provision for a declaratory judgment which is merely advisory." *Liner* v. *City of Rossville*, 212 Ga. 664 (94 S. E. 2d 862); *State of Georgia* v. *Hospital Authority*, 213 Ga. 894 (102 S. E. 2d 543). Additionally, there is the absence of the essential prerequisite of "actual controversy" required by Code Ann. § 110-1101. As was quoted with approval from Borchard on Declaratory Judgments (2d Ed.) by our Supreme Court in *City of Nashville* v. *Snow*, 204 Ga. 371, 377 (49 S. E. 2d 808):

> "'. . . [T]he principle of a declaratory judgment is that it declares the existing law on an existing state of facts. The danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events—and the prejudice to his position must be actual and genuine and not merely possible or remote.' "

Appellant eloquently resists granting the moo[illegible]ss dismissal on three grounds. He first asserts the case is not moot because of "the likelihood of recurrence of conflict between the parties regarding the rights of plaintiffs and others to engage in free speech activities on the property of the Center" citing *Diamond* v. *Bland*, 91 Cal. 501, 503 (477 P. 2d 733). This possibility does not exist in view of Steffel's express declaration in both the District Court and our court. His second argument based upon the recent ruling of *Super Tire Engineering Co.* v. *McCorkle*, ... U. S. ..... (94 S. Ct. ....., 40 L. E. 2d 1) is that "without a resolution of the parties' respective claims, its right to operate private commercial enterprise premises without interference may suffer a substantial adverse effect", is likewise not applicable. The third assertion is that the problem is "capable of repetition yet evading review." This is founded on these words used by the Supreme Court in both *So. Pac. Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498, 515 (31 S. Ct. 279, 55 L. E. 310) and *Super Tire Engineering Co.* v. *McCorkle, supra.* Such claim disappears in the light of the pending state criminal trespass charges against Steffel's companion and the fact that our decision does not deprive appellant of his undertaking a direct test of his right to forbid activities such as union picketing of tenants and distribution of handbills in the public area of his shopping center whenever such situation occurs by making charges against individuals refusing to recognize his private property claims.

As to the Labor Union Local

The sole question presented by the enumerations of error as to the labor union is whether the state court has jurisdiction of this controversy or whether the matter is one that falls within the exclusive jurisdiction of the National Labor Relations Board. In answering the complaint the defendant union local filed a plea to the jurisdiction, a motion to dismiss, and an answer. The jurisdiction plea averred "The matter alleged in the complaint of the plaintiff constitutes conduct which is either protected or prohibited under the terms of the National Labor Relations Act, as amended (29 U. S. C. § 141, et seq.), in either of which events it lies wholly and exclusively within the jurisdiction of the National Labor Relations Board" (R. 27).

The factual setting as to the union involved a picketing situation by its members of one of the shopping center's stores occupied by a tenant of plaintiff. This incident had occurred on January 22, 1971, almost two years before Hudgens filed this suit in January 1973. In the interim the controversy between Hudgens and the union had already been brought before the National Labor Relations Board which was acknowledged by Hudgens in Paragraph 6 of its complaint (R. 3). The record from pages 31 through 41 contains the National Labor Relations Board decision and order rendered August 16, 1971, and reported as 192 NLRB 671. It recites that on the basis of charges filed on January 25, 1971, by Local 315, the General Counsel of the National Labor Relations Board had issued a complaint and hearing notice against Scott Hudgens. It further recites that "On March 24, 1971, the parties, including the General Counsel, entered into a stipulation in which, *inter alia*, they requested that this proceeding be transferred to the Board." The remainder of the Board's decision details facts similar to those pleaded in the Fulton County Superior Court complaint. Their order concludes that this picketing [*sic*] "is an unfair labor practice affecting commerce within the meaning of Section 2(6)

and (7) of the Act" (R. 38). Thus, it appears that at the time Scott Hudgens went into the Superior Court of Fulton County the controversy between him and the union with his stipulated concurrence was already being dealt with by the National Labor Relations Board.

Both here and in the trial court the briefs show the NLRB ruled adversely to Hudgens who then appealed to the U. S. Court of Appeals for the Fifth Circuit. That court remanded the case to the Board where another ruling (205 NLRB No. 104) adverse to Hudgens was rendered. Their ruling of an unfair labor practice was affirmed in *Hudgens* v. *N. L. R. B.*, 501 F. 2d 161, during the pendency of this appeal. Those decisions were based wholly on federal labor law aspects.

When the Supreme Court of Georgia was first called upon to decide this question of jurisdiction in peaceful picketing cases it ruled in *Curry* v. *Construction & c. Laborers Union*, 217 Ga. 512 (123 S. E. 2d 653) that our state courts had jurisdiction where the peaceful picketing was for an unlawful purpose and in violation of Ga. code §§ 54-804 and 66-9906. Upon appeal this ruling was reversed by the U. S. Supreme Court in *Construction Laborers* v. *Curry*, 371 U. S. 542 (83 S. Ct. 531, 9 L. E. 2d 514), on the basis that the National Labor Relations Act placed such controversies within the exclusive powers of the National Labor Relations Board.

Subsequently our Supreme Court was again called upon to consider this jurisdictional question in a matter pertaining to secondary boycotts in *Armstrong Cork Co.* v. *Joiner*, 221 Ga. 789 (147 S. E. 2d 317). We quote from page 795 of that opinion:

> "The case of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (79 S. C. 773, 3 L. E. 2d 775) sets out the criteria for determining whether State jurisdiction has been pre-empted by the National Labor Relations Act. The court said 'when it is clear or *may fairly be assumed* that the activities which a State purports to

> regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the Federal enactment requires that State jurisdiction must yield.' Id., p. 244. (Emphasis ours.) The court coninued, saying, 'If the board decides, subject to appropriate Federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction.' Id., p. 245. Finally the court said that 'at times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board.' "

It therefore appears from this controlling authority that the trial court correctly ruled that as this case involved the question of peaceful picketing it was exclusively within the federal jurisdiction. In fact, a reading of the N. L. R. B. orders which have been appended to the briefs show that the same question raised in the state courts was considered in those proceedings and the union's activities ruled allowable as constituting peaceful picketing.

San Diego Building Trades Council v. *Garmon, supra,* ruled that where an activity is arguably subject to the National Labor Relations Act it is not a matter for state determination. But appellant contends the instant situation comes within the two exceptions mentioned in the opinion. These stated exceptions recognize that States are free to regulate where the activity involved is " a merely peripheral concern of the Labor Management Relations Act," (p. 243) or ". . . where the regulated conduct touched interests so deeply rooted in local feeling or responsibility . . ." (p. 244). Considering that the litgation with the union was still going on in the Federal jurisdiction prior to the filing of the superior court action and that the N. L. R. B. had there ruled that the picketing here complained

of was a protected activity under the Federal Act and had also held that the threat to arrest the pickets for criminal trespass was an unfair labor practice, we find this controversy does not come within either of the two exceptions.

While holding the instant controversy properly belonged in the Federal jurisdiction where it is still pending on appeal we wish to point out that our ruling does not in any way limit the right of the state courts under the police powers of the State to regulate and control disorderly or violent picketing. Furthermore, the State retains the power to prosecute and punish for violations of its criminal statutes. Additionally, our ruling in no way limits the rights of state courts to handle civil damage suits which may arise from labor disputes. Most important,, our refusal to pass upon the right of the appellant to seek declaratory judgment here does not limit our power to construe state laws when we have jurisdiction.

In short, our limited ruling is in conformance with the statement made by the appellant in his brief in the trial court (R. 99) that "The only issue presently before the court, as the hearing herein makes obvious, is one of jurisdiction" and with the trial court's consideration of that single issue.

Judgment affirmed.

BELL, C. J., *and* QUILLIAN, J. *concur.*

APPENDIX D

COURT OF APPEALS OF GEORGIA
Clerk's Office
433 State Judicial Building
Atlanta, Georgia 30334

Case No. 49328. *Scott Hudgens* v. *Local 315, Retail, Wholesale & Department Store Unions, etc.*

The Motion for Rehearing in the above case was Denied today, November 18, 1974.

MORGAN THOMAS, *Clerk*
Tel. 656-3450

APPENDIX E

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 1-22-75

Dear Sir:

Case No. 29634, Hudgens v. Local 315 Retail, Wholesale and Department Store Union, AFL-CIO, et al.

The Supreme Court today denied the writ of certiorari in this case.

HILL, *J.*, disqualified.

Very truly yours,

MRS. JOLINE B. WILLIAMS, *Clerk*

APPENDIX F

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.* (the "Act") and the Georgia Civil and Criminal Code (1969) are set forth below:

NATIONAL LABOR RELATIONS ACT

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

CIVIL CODE OF GEORGIA

110-1101 Power of superior courts to declare rights and legal relations; cases in which power can be exercised; effect of other adequate remedy

(a) In cases of actual controversy the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights, and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such

declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(b) In addition to the cases specified in paragraph (a) of this section, the respective superior courts of the State of Georgia shall have power upon petition, or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, in any civil case in which it appears to the court that the ends of justice require that such declaration should be made, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(c) Relief by declaratory judgment shall be available notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies.

(Acts 1945, p. 137; 1959, pp. 236, 237.)

26-1503 Criminal trespass

(a) A person commits criminal trespass when he intentionally damages any property of another without his consent and the damage thereto is $100 or less, or knowingly and maliciously interferes with the possession or use of the property of another person without his consent.

(b) A person commits criminal trespass when he knowingly and without authority:

(1) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, for an unlawful purpose; or

(2) Enters upon the land or premises of another person, or into any part of any vehicle, railroad car, aircraft, or watercraft of another person, after receiving, prior to such entry, notice from the owner or rightful occupant that such entry is forbidden; or

(3) Remains upon the land or premises of another person, or within the vehicle, railroad car, aircraft, or watercraft of another person, after receiving notice from the owner or rightful occupant to depart.

(c) A person convicted of criminal trespass shall be punished as for a misdemeanor.

(Acts 1968, pp. 1249, 1285; 1969, pp. 857, 859.)